87-81

No. .....

Supreme Court, U.S.
FILED
JUL 9 1987
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1986

—o—

JOHN L. CHEEK,

Petitioner,

vs.

THE L.A. POLICE DEPARTMENT, OFFICERS JOHN DOE & PETER ROE, THOSE MEMBERS OF THE L.A.P.D. WHOSE TRUE AND CORRECT NAMES ARE UNKNOWN TO PLAINTIFF AT THIS TIME,*

Respondents.

—o—

On Petition for Writ of Certiorari to the Court of Appeal of California for the Second Appellate District, Division Three

—o—

PETITION FOR WRIT OF CERTIORARI

—o—

JOHN L. CHEEK
Petitioner in Propria Persona
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Telephone: (312) 439-2045

* Discovery indicates that John Doe is Robert A. Luxford and Peter Roe may be L. Aquino, No. M8968 or J. Wolder, No. B8528.

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
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QUESTIONS PRESENTED

1. Did the Court of Appeal error when it refused to rule on the law, and thus remand with instructions to grant PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON LAW FOR THE FACTS AND JURY TRIAL FOR THE AMOUNT OF PUNITIVE DAMAGES filed April 10, 1985?

2. Did the Court of Appeal error when it refused to reverse the order of Judge Goertzen dismissing the case on Feb. 7, 1986 after plaintiff filed a MOTION TO SET TRIAL DATE OR ISSUE CASE STATUS JUDGMENT on Dec. 26, 1985 and defendants filed an opposition to setting case for trial and motion to dismiss for lack of prosecution pursuant to section 583.310 California Code of Civil Procedure?

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DENIAL BELOW

The Superior Court order of dismissal is reproduced as Appendix "A1". The Court of Appeal judgment of dismissal is reproduced as Appendix "B1", the Court of Appeal denial of the PETITION FOR REHEARING is reproduced as Appendix "B2", and the Court of Appeal Remittitur Notice is reproduced as Appendix "B3". The Cal. S. Ct. refusal of appellant's PETITION FOR REVIEW is reproduced as "Appendix "C1".

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GROUNDS OF JURISDICTION OF SUPREME COURT

This writ arises from the judgment of the Court of Appeal entered on Jan. 28, 1987.

The jurisdiction of the Court is invoked under the provisions of 28 U.S.C. Sec. 1651.

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APPLICABLE CONSTITUTIONAL PROVISIONS AND CALIFORNIA DRIVER'S HANDBOOK

Amendment 4 of the U.S. Constitution states, in part, as follows:

> The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation . . .

Amendment 8 of the U.S. Constitution states:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Art. I, Sec. 1 of the California Constitution states, in part, as follows:

> All people are by nature free and independent & have inalienable rights. Among these are . . . happiness, & privacy.

Art. I, Sec. 13 of the Cal. Constitution states, in part, as follows:

> The right of the people to be secure in their persons, . . . against unreasonable seizures and searches may not be violated; and a warrant may not issue except on probable cause, supported by oath or affirmation . . .

Page 37 of the 1984 California Driver's Handbook states, in part, as follows:

> Pedestrians have the right-of-way at intersections . . . "jaywalk" . . . between intersections . . .

———o———

STATEMENT OF THE CASE

Petitioner was forcibly choked and arrested without a warrant, forcibly fingerprinted and injured without a warrant, strip searched including cavity search about 1 & ½ hours after the arrest without a warrant, and released to his supervisor by bail requiring him to appear in court 15 days after his release. Petitioner was charged with resisting arrest, and he was in jail nearly 6 & ½ hours on July 2, 1980. Petitioner appeared in court on July 17, 1980, but

the respondents did not appear. Petitioner filed complaint No. C339,947 on Sept. 30, 1980. Petitioner filed an unanswered amended complaint on Oct. 24, 1983 after learning that 16 persons had died following choke holds by LAPD police officers (see *City of Los Angeles v. Lyons,* 103 S.Ct. 1660 at 1672,) because respondents were not answering discovery in a timely and co-operative matter. Petitioner filed a motion for summary judgment on law for the facts & jury trial for the amount of punitive damages on April 10, 1985 which was "denied, triable issue of material fact as to whether force used was reasonable" on Sept. 13, 1985 by Judge Jones after 2 continuances by the court and 1 continuance by the respondents. The case was dismissed on or about Jan. 23, 1986 by Judge Goertzen for failure to prosecute, and his order entered by the court on Feb. 7, 1986. The Court of Appeal affirmed the dismissal on Jan. 28, 1987, and it also refused to rule on the law. An unanswered PETITION FOR REHEARING was denied without opinion on Feb. 23, 1987. An unanswered PETITION FOR REVIEW was denied without opinion by the Supreme Court of Cal. on April 15, 1987.

—o—

SUBSTANTIALITY OF FEDERAL QUESTION

Questions concerning Amendments 4 & 8 of the U.S. Constitution are before the Court. The California courts refused to rule on these questions and questions concerning the California Constitution. The law has already been decided by the Supreme Court, but this Court should issue the Writ of Error because the California Courts didn't rule on law that was presented to them in an actual controversy.

Marbury v. Madison, 1 Cranch (5 U.S.) 137 at 163; and *Ableman v. Booth* and *U.S. v. Booth,* 62 U.S. 506.

—o—

ARGUMENT

The opinion given by the Court of Appeal on Jan. 28, 1987 errors in both law and facts. Petitioner can't be held to the standards of a lawyer. Petitioner's motion for summary judgment filed April 10, 1985 should have been granted by Judge Jones. The Court of Appeal errored in holding that the necessity of ruling on the summary judgment contentions was moot. The court errored in holding that the matter was continued on July 29 to Sept. 13, 1985 at *Plaintiff's* own request. The Court errored when it held that no discretion was involved for the present case under section 583.310[1] in requiring the action to be brought to jury trial within 5 years after the action was commenced on Sept. 30, 1980. The court errored when it did not hold that the record reflects that plaintiff's failure to bring the case to trial was excused by reason that it was "impossible, impracticable, or futile" (sec. 583.340). The court jumps to conclusions that are not supported by the record concerning petitioner's discovery complaints. The court correctly held that dismissal pursuant to sec. 583.410 was improper, and the court stated correctly that the complaint filed October 24, 1983 was not answered.

"An impartial decision maker is essential." *Goldberg v. Kelly,* 90 S.Ct. 1011 at 1022. The words of Chief Justice

[1]All future statutory references are to the Cal. Code of Civil Procedure unless otherwise indicated.

Marshall cited with approval in *O'Donoghue v. U.S.*, 53 S.Ct. 740 at 743, should never be forgotten:

> "I have always thought, from my earliest youth till now, that the greatest scourge an angry Heaven ever inflicted upon an ungrateful and a sinning people, was an ignorant, a corrupt, or a dependent Judiciary."

The Court errored when it cited *Nelson v. Gaunt*, 125 Cal. App.3d 623, as authority for "when a litigant is appearing in propria persona, he is entitled to the same, but no greater, consideration than other litigants and attorneys". This case is in conflict with *Haines v. Kerner*, 92 S.Ct. 594 at 596, where the Supreme Court held that a pro se couldn't be held to the standards of a lawyer.

The REPLY OF APPELLANT contained copies of 3 letters that petitioner had written in an attempt to stay informed of the status of his case in Superior Court. Exhibit A2 in the reply was a copy of petitioner's certified letter #P 448 935 637 dated March 5, 1985 that appears at C.T. 273. It is believed that copies of of the other 2 letters do not appear in the Clerk's transcript.[2] The March 5, 1985 letter stated that petitioner's motion filed Jan. 15, 1985 was denied on Feb. 15, 1985 without giving petitioner a chance to reply. This letter also stated that respondents' opposition was not mailed until Feb. 13, 1985. Exhibits A3 and A4 showed that petitioner was not being informed about the status of PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON LAW FOR THE FACTS AND

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[2]Exhibit A3 in the REPLY OF APPELLANT was certified letter #P 448 935 641 written to the Los Angeles County Clerk on May 28, 1985. Exhibit A4 was a letter written to the clerk on July 6, 1985.

JURY TRIAL FOR THE AMOUNT OF PUNITIVE DAMAGES.[3] Exhibit A3 showed that petitioner wrote the court on May 28, 1985 and stated "What is going on . . . I *object* to the procedural due process in case No. C 339,947." Exhibit A4 showed that petitioner attempted to get a copy of the judge's decision on his April 10, 1985 summary judgment motion by sending a stamped self-addressed envelope to the court on July 6, 1985.

The Court's opinion erred on page 8 when it stated that "on July 29 the matter was continued to September 13, 1985 at *plaintiff's* own request." C.T. 94 shows that on May 9, 1985 Judge Jones on the court's own motion continued to June 24, 1985. Note that notice "by moving party" is marked in spite of notice of probable nonappearance (C.T. 85) that was given to the court pursuant to Rule 321 Cal. Rules of Court by petitioner. C.T. 100 shows

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[3]C.T. 199 mentions a motion for summary judgment heard on Feb. 15, 1985 and denied. C.T. 199 also mentions a motion for summary judgment (C.T. 49) heard on Dec. 17, 1984 and denied. This motion filed on Dec. 4, 1984 had already been denied without oral argument in spite of such request (see the NOTICE OF FILING C.T. 48) when petitioner arrived for court to open on Dec. 17, 1984, and the petitioner was not granted a continuance. Although both motions were for some form of summary judgment, the motions were not the same and a filing fee was paid with each motion. Both motions were promptly denied for procedural reasons, but petitioner did not receive a copy of the MINUTES ENTERED for either motion when they were denied. Petitioner did receive a copy of the MINUTES ENTERED for Feb. 15, 1985 after he wrote Judge Jones certified letter #P448, 935 637 on March 5, 1985. This copy of the MINUTES ENTERED made petitioner who had been relying exclusively on the Cal. Rules of Court aware that Cal. Code of Civil Procedure existed. See petitioner's reply filed May 14, 1985 (C.T. 95 and 96) in support of his April 10, 1985 summary judgment motion. Note also that C.T. 99 shows this reply was served by mail on May 4, 1985.

that on June 24, 1985 Judge Jones on the court's own motion continued to July 29, 1985. Note that notice "by moving party" is marked and crossed out and "by respondent(s)" is marked. Did certified letter #P 448 935 641 (see Exhibit A3 in REPLY OF APPELLANT) to the clerk on May 28, 1985 cause the notice to be marked correctly? Note also that the proceedings is incorrectly marked first continuance when in fact it was the second continuance. The MINUTES ENTERED on July 29, 1985 (C.T. 101) incorrectly shows request of "moving party" rather than "respondents", and it incorrectly shows 2nd continuance rather than 3rd continuance. C.T. 102 clearly states that Judge Jones granted *respondents* a continuance on July 25, 1985 to Sept. 13, 1985. Note also that the Deputy Clerk for the MINUTES ENTERED on July 29, 1985 is L. Gold rather than C. Fooks who was the Deputy Clerk on May 9, 1985 and June 24, 1985. Attention is also directed to lines 12-14 on page 5 of RESPONDENT'S BRIEF where they stated that "on July 25, 1985, the trial court granted respondents' request for a continuance until September 13, 1985 in order to respond to the trial court's request."

The above statements document the fact that Judge Jones was not an impartial decision maker in C 339,947. Judge Jones promptly denied appellant's motions filed Dec. 4, 1984 and Jan. 15, 1985 for procedural reasons; however, he granted respondents 2 continuances on the court's own motion and 1 continuance on the motion of respondents. This Court should be able to understand why petitioner did not file a certificate of readiness after his summary judgment motion was finally denied on Sept. 13, 1985, more than 5 months after it was filed and hand delivered

on April 10, 1985 (C.T. 85). Can the Court also see why the REPLY OF APPELLANT (see page 15) requested a special equity judgment that would have allowed appellant to move C 339,947 to U.S. District Court?

The Superior Court refused to file Petitioner's REQUEST TO RECONSIDER AND GRANT MOTION OR STATE REASONS FOR DENYING MOTION served Sept. 21, 1985 because it wasn't a "written *motion* for reconsideration". See C.T. 237 at item #14.

Petitioner then filed a motion to reconsider on Oct. 10, 1985 (C.T. 216) in order to review the facts for Judge Jones and establish the record. Respondents filed an opposition on Nov. 6, 1985 (C.T. 227). Note that respondents did not mention the 5 years that had expired. Petitioner mailed his reply on Nov. 11, 1985 (C.T. 211-214); however, the reply was not stamped and filed by the court and it probably wasn't reviewed by Judge Jones. MINUTES ENTERED on Nov. 18, 1985 show that the motion was denied by Judge Jones for not being timely (C.T. 231). Petitioner then mailed a MOTION TO SET TRIAL DATE OR ISSUE CASE STATUS JUDGMENT on Dec. 19, 1985 (C.T. 235), which was filed on Dec. 26, 1986. Pages 2 and 3 of this motion (C.T. 236 & 237) give a good review of the case. See item #15 (C.T. 237) and note the reply mentioned above (C.T. 211-214) was not stamped because the court stated in an E141 letter that a filing fee of $14.00 was due. Respondents filed an opposition on Jan. 15, 1986 (C.T. 241) and a motion to dismiss on Jan. 16, 1986. Judge Goertzen denied petitioner's motion on Jan. 23, 1986 (C.T. 252). The NOTICE OF RULING prepared by Deputy City Attorney James (C.T. 261 & 262) states the case was

dismissed by Judge Goertzen on Jan. 22, 1986. The ORDER of Judge Goertzen (C.T. 264 & 265) states the case was dismissed on Jan. 23, 1986. Note that Jan. 22, 1986 is changed to Jan. 23, 1986 and a *Hi* appears after the signature of Judge Goertzen.

Please note the Clerk's Transcript shows that Judge Jones was still on the case as late as Nov. 18, 1985, and the C.T. does not show the appearance of Judge Goertzen until the NOTICE OF Ruling (C.T. 261 & 262) indicates petitioner's motion was denied and respondent's motion was granted on Jan. 22, 1986. This fact makes petitioner even more concerned about the *Hi* that appears on the line after Judge Goertzen's signature.

The Court of Appeal jumped to conclusions that are not supported by the record concerning Petitioner's discovery complaints. C.T. 236 summarizes some of petitioner's complaints concerning discovery. Note that items 3, 4, and 5 show that petitioner filed and scheduled a MOTION TO COMPEL ANSWERS TO INTERROGATORIES for 2/17/83, petitioner took the motion off the calendar per a request and promise of Deputy City Attorney James, and petitioner still had not received the answers on 8/24/83. See C.T. 53 for more details and summations and C.T. 57-70 for some of the actual documents. Note the attempted defense of respondents by affirmative offense against petitioner on C.T. 64 which was probably initiated by certified letter #P431 851 477 (C.T. 63) from petitioner to James on August 24, 1983. The Court of Appeal jumped to a conclusion not supported by the facts of this case on page 9 when it stated that "plaintiff must have considered that issue to be de minimus since he filed

a motion for summary judgment on April 10, 1985, at which time he must have believed no further discovery was necessary or outstanding." The facts show that petitioner had just become aware that the Cal. Code of Civil Procedure existed, and he was concerned about the statute for bringing a case to trial within 5 years.

The Supreme Court of California has consistently favored the policy which disposes of cases on the merits. *Denham v. Superior Court,* 2 Ca3d 557 at 566; *Hocharian v. Superior Court,* 28 Ca3d 714 at 722-723; *Wilson v. Sunshine Meat And Liquor Co.,* 194 CaR 773 at 778. See pages 13-14 of the REPLY OF APPELLANT for some quotes from these cases. The facts show that petitioner showed excusable delay that would make the case fall within the exception to prosecution given by sec. 583.340. The facts show that respondents violated petitioner's rights 4 separate times, and petitioner is entitled to partial summary judgment on his April 10, 1985 motion as a matter of law for any of the 4 violations[4]:

1. The respondents forcibly choked and arrested petitioner and charged him with resisting arrest on July 2, 1980 in violation of Amendment 4; Art. I, Sections 1 & 13 of the Cal. Constitution; and page 37 of the 1984 Cal. Driver's Handbook. See *Kolender v. Lawson,* 103 S.Ct. 1855; *Brown v. Texas,* 443 U.S. 47; and *Kent v. Dulles,* 357 U.S. 116 at 125. The affirmative defenses stated on

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[4]The 4 violations of petitioner's rights are briefed with quotes on pages 2-10 of the BRIEF ON BEHALF OF PLAINTIFF-APPELLANT and pages 2-7 of his memorandum in support of his April 10, 1985 motion for partial summary judgment (C.T. 87-92).

C.T. 42 & 43 won't stand muster under constitutional scrutiny. *Owen v. City of Independence, Missouri, Et Al.* 445 U.S. 622 at 635, 651, 652, & 657; *U.S. v. Lee,* 106 U.S. 196 at 208 & 220. The respondents requested and are entitled to a jury trial for the amount of punitive damages (see *Smith v. Wade,* 103 S.Ct. 1625 at 1638); however, it is common sense that you can't be arrested for resisting arrest. The apparent contention that petitioner was "jaywalking" is not supported by the facts. Affidavits of petitioner executed on Jan. 10, 1985 and Nov. 11, 1985 (C.T. 83 & 213), and the arrest report of R.A. Luxford (C.T. 77), show the petitioner crossed the street in the crosswalk, and page 37 of the 1984 Cal. Driver's Handbook (C.T. 79) states by definition that petitioner was not "jaywalking". This handbook also states that "pedestrians have the right-of-way at intersections". The issue of whether or not petitioner walked against the light is contested (C.T. 161), but walking against a light does not justify a forcible arrest and compulsory court appearance when there is no accident or damage.

2. The forcible fingerprinting of petitioner without a warrant violated both the U.S. Constitution and the Cal. Constitution. The warrant requirement of Amendment 4 was upheld by the Supreme Court in *Davis v. Mississippi,* 394 U.S. 721. Item #4 on C.T. 107 shows that petitioner was fingerprinted without a warrant. C.T. 68, 69, 179, and 180 show that petitioner's left elbow was injured during the forced fingerprinting.

3. The strip search including cavity search of petitioner approximately 1½ hours after the arrest violated his right to privacy. See *Schmerber v California,* 384 U.S.

757; *Hill v. Bogans,* 735 F.2d 391; and *State v. Clark,* 654 P.2d 355. Item #5 on C.T. 107 shows that respondents admit petitioner was strip searched.

4. The cruel and unusual bail which required petitioner to appear in court in Los Angeles 15 days after the arrest violated Amendment 8 of the U.S. Constitution. See item #8 on C.T. 107 and C.T. 80.

"If there be an admitted wrong, the courts will look far to supply an adequate remedy." *De Lima v. Bidwell,* 182 U.S. 1 at 176-177. "Where rights secured by Constitution are involved; there can be no rule making or legislation which would abrogate them." *Miranda v. Arizona,* 384 U.S. 436 at 491.

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CONCLUSION

Based on the foregoing points and authorities, petitioner is entitled to have his April 10, 1985 motion for partial summary judgment granted as a matter of law for the facts of the case. Petitioner is entitled to compensatory and actual damages including attorneys' fees and costs and a jury trial to determine the amount of punitive damages for the unlawful acts of respondents as a matter of law. The REMITTITUR NOTICE issued May 11, 1987 shows that the Court of Appeal intends to damage petitioner even more by requiring him to pay costs.

Petitioner respectfully requests the Supreme Court to grant the PETITION and issue a WRIT OF ERROR to the Court of Appeal of California directing that court to issue a judgment awarding petitioner partial summary

judgment as requested and to remand the case with relief that would allow petitioner to move the case to U.S. District Court or in the alternative to remand with specific jury instructions on law and procedures that will allow petitioner to get a fair jury trial in Superior Court with a competent and impartial judge. Petitioner also respectfully requests such further relief as is just and proper.

Respectfully submitted,

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APPENDIX "A"

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SUPERIOR COURT OF CALIFORNIA
COUNTY OF LOS ANGELES

JOHN L. CHEEK,	)	
	)	
Plaintiff,	)	
	)	CASE NO.
vs.	)	C 339 947
	)	
CITY OF LOS ANGELES, et al.,	)	ORDER
	)	
	)	
Defendants.	)	

(Filed February 7, 1986)

This matter came before the Honorable Jack E. Goertzen in Department 1 of the Los Angeles Superior Court on January 23, 1986 pursuant to JOHN L. CHEEK's Motion to Set Trial Date. The plaintiff acting in pro per filed a Notice of Non-appearance.

The court reviewed plaintiff's papers in support of his motion, noting that the five-year statute had run in September 1985.

Having read the opposition papers filed by Defendant, CITY OF LOS ANGELES, and upon the oral Motion to Dismiss by the City of Los Angeles, the court, after finding no justification for said delay in bringing case to trial within the five years, hereby dismisses the plaintiff's Complaint pursuant to *California Code of Civil Procedure,* Section 583.410.

IT IS SO ORDERED.

Dated: February 7, 1986

By /s/ Jack E. Goertzen *Hi*
Jack E. Goertzen

LOS ANGELES SUPERIOR COURT

APPENDIX "B1"

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF
THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

JOHN L. CHEEK,	)	
	)	
Plaintiff and Appellant,	)	
	)	B019537
v.	)	
	)	(Super.Ct.No.
THE LOS ANGELES POLICE DEPARTMENT, et al.,	)	C 339947)
	)	
	)	
Defendants and Respondents.	)	

(Filed January 28, 1987)

APPEAL from an order of the Superior Court of Los Angeles County. Jack E. Goertzen, Judge. Affirmed.

John L. Cheek, in propria persona, for Plaintiff and Appellant.

James K. Hahn, City Attorney, John T. Neville, Senior Assistant City Attorney, Richard M. Helgeson, Assistant City Attorney and Katherine J. Hamilton, Deputy City Attorney, for Defendants and Respondents.

Plaintiff John L. Cheek appeals from an order of dismissal for failure to bring the case to trial within five years "pursuant to California Code of Civil Procedure, section 583.410." The appeal is taken from a clerk's transcript.

PROCEDURAL AND FACTUAL STATEMENT

On September 30, 1980, the original complaint was filed. On October 24, 1983, an amended complaint was filed. The thrust of plaintiff's action is that he was unlawfully choked and arrested, as well as forcibly fingerprinted and strip-searched, on July 2, 1980, by officers of the Los Angeles Police Department. He alleged that as the result of such wrongful acts, he suffered physical and mental injuries, loss of wages, and damage to his watch crystal. The prayer sought compensatory damages of "at least $430" and punitive damages of "at least $2,000,000".

Defendant City of Los Angeles answered the original complaint on November 17, 1980, by generally denying its material allegations and by setting forth nine affirmative defenses. Apparently this answer served as the answer to the amended complaint as well.

On September 13, 1985, following a hearing, plaintiff's motion for summary judgment was denied on the ground that a triable issue of material fact remained as to whether the force used was reasonable.

On November 18, 1985, plaintiff's motion for reconsideration of the September 13, 1985, ruling, was heard and denied.

On December 26, 1985, plaintiff filed a motion to set the trial date. He conceded in the motion that he knew that an action had to be brought to trial within five years from the date the action was commenced (Code Civ. Proc., § 583.310). He asserted, however, that he was not a licensed lawyer, and thus, that requirement should not be enforced against him. He further argued against enforcement of

that rule on the basis of delay created by defendants and because the court allowed defendants, instead of the court, to give notice of the proceedings.

In its opposition filed January 15, 1986, defendant City of Los Angeles claimed that the delays were due to plaintiff's choice to proceed in propria persona, not to defendant. Defendant argued that the court was required to dismiss the action under Code of Civil Procedure[1] section 583.310 in the absence of justification by plaintiff for not bringing the action to trial within five years.

On January 22, 1986, following a hearing at which plaintiff made no appearance, but instead filed a notice of non-appearance, the court denied plaintiff's motion to set a trial date and granted defendant's oral motion to dismiss pursuant to section 583.410.

The resulting order, filed February 7, 1986, reveals that the court dismissed the complaint pursuant to section 583.410 (the three-year statute) after finding no justification for plaintiff's failure to bring the case to trial within five years. In making its ruling the court reviewed plaintiff's moving papers and defendant's opposing papers and considered the presentation made by defendant in support of its oral motion for dismissal.

DISCUSSION

On appeal plaintiff attacks the order denying his motion for summary judgment and the order denying his motion to set a trial date and granting, instead, defendant's motion to dismiss.

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[1]All future statutory references are to the Code of Civil Procedure unless otherwise indicated.

We address first plaintiff's contentions concerning the dismissal order since an affirmance of that order renders moot the necessity to consider his contentions as to the summary judgment ruling.

Plaintiff argues that dismissal pursuant to section 583.410 was improper, because there was no compliance with (nor waiver of) rule 373(a) of the California Rules of Court, which requires the filing of a motion under that section at least 45 days before the date set for hearing.

We agree.[2] However, from our review of the record we conclude that reference to section 583.410 in the order was due to an inadvertent mistake on the part of the court. That section grants a court discretion to dismiss an action for delay in prosecution on its own motion or on the motion of a defendant on any of the grounds set forth in section 583.420. In pertinent part the latter section provides that the court may exercise its discretion to dismiss for delay when more than three years have lapsed since the action was commenced. (§ 583.420, subd. (a)(2)(A).)

Instead, the court must have meant to refer to section 583.310, which requires an action to be brought to trial within five years after the action is commenced. Noncompliance with that section mandates dismissal of the action as a general rule. No discretion is involved. (§ 583.360.)

In any event, " '[n]o rule of decision is better or more firmly established by authority, nor one resting upon a

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[2]On January 16, 1986, defendant filed a motion for dismissal under section 583.310 for failure to bring the action to trial within the five-year period. In his opposition filed February 3, 1986, plaintiff pointed to defendant's noncompliance with rule 373(a). On February 6, 1986, the hearing date, the motion was taken off calendar by the court.

sounder basis of reason and propriety, than that a ruling or decision, itself correct in law, will not be disturbed on appeal merely because given for a wrong reason. If right upon any theory of the law applicable to the case, it must be sustained regardless of the considerations which may have moved the trial court to its conclusion.' [Citation.]" (*D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 19.)

Dismissal under section 583.310 was proper since the present action was not brought to trial within five years of September 30, 1980, the date when the action was commenced.

Initially, we point out that, by its terms, rule 373(a) does not apply to dismissals under section 583.310. Accordingly, defendant's failure to comply with the provisions of that rule is of no legal import.

Moreover, nothing in the record reflects that plaintiff's failure to bring the case to trial within five years was excused by reason that it was "impossible, impracticable, or futile" to do so. (§ 583.340, subd. (c).)

As an excuse, plaintiff again points to the fact that he is not a licensed lawyer. We find no significance in this fact. "When a litigant is appearing in propria persona, he is entitled to the same, but no greater, consideration than other litigants and attorneys [citations]. Further, the in propria persona litigant is held to the same restrictive rules of procedure as an attorney [citation]." (*Nelson v. Gaunt* (1981) 125 Cal.App.3d 623, 638-639.)

As another excuse, plaintiff refers to the fact that he resides in Illinois, not California. He does not, however,

make any substantive argument or cite any authority that a foreign plaintiff should be excused from compliance with section 583.310's provisions. We therefore reject this claim of excuse. (See *Strutt v. Ontario Sav. & Loan Assn.* (1972) 28 Cal.App.3d 866, 873-874.)

He also asserts that the failure to bring the action to trial within the five-year period must be attributed to the delays caused by the court itself in granting several continuances of the hearing on his motion for summary judgment and by defendant's delay in providing discovery.

We find no merit to defendant's last excuse. The record reveals that the original hearing on his summary judgment motion was continued from May 9, 1985 to June 24, 1985 in order to permit defendant to file a separate statement pursuant to section 437c, subdivision (b). On June 24 the matter was continued to July 29, 1985, for the same reason. On July 29 the matter was continued to September 13, 1985, at plaintiff's own request.

There is no indication in the record that plaintiff timely objected to the continuances from May 9 to July 29. Moreover, we find no prejudice accruing to plaintiff by virtue of such continuances inasmuch as plaintiff himself continued the matter until September 13, 1985.

Although plaintiff points to defendant's recalcitrance in supplying discovery as a reason for delay, he fails to point out the nexus between such claimed delay and the failure to bring the case to trial within the five-year period. In his motion to set a trial date plaintiff complained that defendant still had not identified the person who allegedly injured plaintiff during the fingerprinting process. However, the record does not reflect that plaintiff made any

motion to compel defendant to answer that question. Also, plaintiff must have considered that issue to be de minimus since he filed a motion for summary judgment on April 10, 1985, at which time he must have believed no further discovery was necessary or outstanding.

The record is also devoid of any certificate of readiness, which is a condition precedent to the setting of a trial date. There is simply no connection between the failure to file such a certificate and any delays due to any continuances by the court or to discovery omissions by defendant.

Finally, plaintiff has not explained why he made no motion to specially set a trial date after his motion for summary judgment was denied on September 13, 1985. The five-year period ran on September 30, 1985, yet his motion to set a trial date was not filed until December 26, 1985.

This disposition makes it unnecessary to address plaintiff's remaining contentions.

DECISION

The order of dismissal is affirmed.

NOT TO BE PUBLISHED

DANIELSON, J.

We concur:

KLEIN, P.J.

HOM, J.*

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* Assigned by the Chairperson of the Judicial Council.

APPENDIX "B2"

OFFICE OF THE CLERK
COURT OF APPEAL
STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
CLAY ROBBINS, JR., CLERK

DIVISION: 3 DATE: 02/23/87

8019537

John L. Cheek
795 Wellington Ave
Elk Grove, IL 60007

RE: Cheek, John L.
vs.
Los Angeles Police Department, Et Al

2 Civil B019537
Los Angeles No. C339947

PETITION FOR REHEARING DENIED.

APPENDIX "B3"

COURT OF APPEAL OF THE STATE
OF CALIFORNIA
FOR THE SECOND APPELLATE DISTRICT
DIVISION: 3

John L. Cheek
795 Wellington Ave
Elk Grove, CA (sic) 60007

RE: Cheek, John L.
vs.
Los Angeles Police Department, Et Al

2 Civil B019537
Los Angeles NO. C339947

* * REMITTITUR NOTICE * *

Notice is hereby given that the Remittitur has been issued this date and that the opinion, decision or order entered in the above entitled cause on 01/28/87 is now final.

* * Affirmed In Full. * *

—Appellant X Respondent to recover costs.
—Each party to bear own costs.
—Costs are not awarded in this proceeding.

CLAY ROBBINS, JR., Clerk

By: MAY 11, 1987

Deputy Clerk

APPENDIX "C"

ORDER DENYING REVIEW
AFTER JUDGMENT BY THE COURT OF APPEAL
2nd District, Division 3, No. B019537
S000223

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

IN BANK

CHEEK

v.

THE LOS ANGELES POLICE DEPARTMENT et al.

(Filed April 15, 1987)

Appellant's petition for review DENIED.

LUCAS
Chief Justice